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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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9 CHARLES CHATMAN, ) No. C 03-2820 MMC (PR)  
10 Plaintiff, )  
11 v. ) **ORDER OF SERVICE RE: AMENDED**  
12 RICHARD EARLY, et al., ) **COMPLAINT; SETTING BRIEFING**  
13 Defendants. ) **SCHEDULE; DENYING DISPOSITIVE**  
14 ) **MOTIONS WITHOUT PREJUDICE;**  
15 ) **DENYING MOTION FOR APPOINTMENT**  
16 ) **OF COUNSEL**  
17 ) **(Docket Nos. 69, 81 & 93)**

18 In 2003, plaintiff Charles Chatman, a state prisoner proceeding pro se, filed the above-  
19 titled civil rights complaint pursuant to 42 U.S.C. § 1983. In 2004, the action was dismissed  
20 by the Court and, in 2005, the Court of Appeals vacated the order of dismissal and remanded  
21 the matter. Thereafter, in an order dated October 16, 2006, the Court found plaintiff had  
22 stated cognizable claims for relief based on his allegations of food deprivation, retaliation  
23 and interference with his mail; the Court ordered the complaint served on thirty-six  
24 defendants.<sup>1</sup> To date, nineteen defendants have been served and made an appearance in this  
25 matter. Eighteen of the served defendants are represented by the Attorney General's Office  
26 ("AG defendants"), and one defendant, John Chen ("Chen"), is represented by counsel for  
27 the California Office of the Inspector General ("OIG").

<sup>1</sup>Said defendants included numerous prison officials at Salinas Valley State Prison, supervisory officials employed by the California Department of Corrections, and John Chen, Chief Deputy Inspector General for the California Office of the Inspector General.

1 The following matters are now before the Court: (1) plaintiff's first amended  
2 complaint ("AC"); (2) the AG defendants' motion to dismiss the complaint for failure to  
3 exhaust administrative remedies, as a non-enumerated motion under Rule 12(b) of the  
4 Federal Rules of Civil Procedure,<sup>2</sup> and for failure to state a claim upon which relief can be  
5 granted, pursuant to Rule 12(b)(6); (3) defendant Chen's motion for summary judgment  
6 pursuant to Rule 56; and (4) plaintiff's motion for the appointment of counsel.

## 7 DISCUSSION

### 8 A. Amended Complaint

9 On January 3, 2008, plaintiff filed his AC. A plaintiff may amend his complaint once  
10 as a matter of course at any time before a responsive pleading is served. See Fed. R. Civ. P.  
11 15(a). Motions under Rule 12 or for summary judgment under Rule 56 are not "responsive  
12 pleadings"; consequently, filing such a motion does not bar the plaintiff from thereafter  
13 amending the complaint once as a matter of right. See William W. Schwarzer, et al., Federal  
14 Civil Procedure Before Trial § 8:376 (2007) (citing Crum v. Circus Circus Enterprises, 231  
15 F.3d 1129, 1130 n.3 (9th Cir. 2000) (Rule 12 motion) and McDonald v. Hall, 579 F.2d 120,  
16 121 (1st Cir. 1978) (Rule 56 motion)). Accordingly, although defendants have filed a motion  
17 to dismiss and a motion for summary judgment, both of which are pending before the Court,  
18 plaintiff may amend his complaint as a matter of course under Rule 15(a).

19 The Court must review the AC before it can proceed, however; under 28 U.S.C. §  
20 1915A, a federal court must conduct a preliminary screening in any case in which a prisoner  
21 seeks redress from a governmental entity or officer or employee of a governmental entity.  
22 See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and  
23 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may  
24 be granted or seek monetary relief from a defendant who is immune from such relief. See id.  
25 § 1915A(b)(1),(2).

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27 <sup>2</sup>Hereinafter, all references to "Rules" are to the Federal Rules of Civil Procedure,  
unless otherwise noted.

1 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
2 elements: (1) that a right secured by the Constitution or laws of the United States was  
3 violated, and (2) that the alleged violation was committed by a person acting under color of  
4 state law. See West v. Atkins, 487 U.S. 42, 48 (1988). Pro se pleadings must be liberally  
5 construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

6 1. Claims

7 Plaintiff makes the following allegations in the AC.

8 On July 29, 2001, plaintiff was transferred from Corcoran State Prison to Salinas  
9 Valley State Prison ("SVSP"). Approximately one and one-half weeks later, SVSP was  
10 placed on lockdown status and the inmates were served food in their cells. Plaintiff and his  
11 cellmate complained to SVSP custody staff that the food was being served in unsanitary  
12 conditions. During the lockdown, numerous SVSP employees brought food to plaintiff's cell  
13 but refused to give plaintiff and his cellmate breakfast and lunch because they had not turned  
14 on the "bright lights," as opposed to the "regular lights," in their cell. The lockdown and  
15 food deprivation lasted from August 16 through October 9, 2001. As a result of being  
16 deprived of adequate food, plaintiff suffered dizziness, vomiting, headaches, back pain,  
17 hypertension and leg numbness, and he lost more than twenty pounds.

18 Plaintiff filed administrative appeals and wrote complaint letters to SVSP and  
19 California Department of Corrections ("CDC") officials, as well as to a prisoner rights  
20 organization, about the food deprivation. He also wrote the OIG a complaint letter,  
21 requesting an investigation into the matter. None of the prison or CDC officials or the OIG's  
22 office intervened on plaintiff's behalf.

23 On August 29, 2001, plaintiff was returned to his cell from the infirmary, where he  
24 was seen for medical reasons. Plaintiff was told to strip naked for a search, which he did;  
25 because of his health concerns, however, he refused to comply with a correctional officer's  
26 demand that he walk barefoot for twenty-five yards on the cold concrete floor. As a result,  
27 plaintiff was placed on "Management Control Status" ("MCS") for four days, during which

1 time his personal property, including essential items such as toilet paper, soap, a toothbrush  
2 and toothpaste, was confiscated, the water supply to his cell was turned off, and he was  
3 denied access to a doctor. Subsequently, plaintiff was charged with a rules violation for  
4 disobeying a direct order. Plaintiff appealed the matter of his placement on MCS to SVSP  
5 and CDC officials, but his appeals were denied.

6 After plaintiff began filing administrative appeals and writing complaint letters,  
7 officials at SVSP and at the California Correctional Institute at Tehachapi (“CCI”)<sup>3</sup> started  
8 interfering with, confiscating and censoring his legal mail. Plaintiff filed administrative  
9 appeals with SVSP and CDC officials concerning the legal mail problems, and also wrote a  
10 complaint letter to the OIG regarding censorship of his legal correspondence. None of the  
11 prison or CDC officials or the OIG’s office intervened on plaintiff’s behalf.

12 Plaintiff asserts the following causes of actions for monetary damages based on the  
13 above allegations: (1) the violation of plaintiff’s First and Fourteenth Amendment rights  
14 because defendants interfered with, confiscated and censored plaintiff’s legal mail, and they  
15 did so in retaliation for plaintiff’s complaints about the conditions of his confinement; (2) the  
16 violation of plaintiff’s First, Eighth and Fourteenth Amendment rights because defendants  
17 denied plaintiff adequate food while he was on lockdown, and they did so in retaliation for  
18 plaintiff’s complaints about unsanitary food conditions; (3) the violation of plaintiff’s First,  
19 Eighth and Fourteenth Amendment rights because defendants placed plaintiff on MCS status  
20 and denied him basic necessities, and they did so in retaliation for plaintiff’s complaints  
21 about unsanitary food conditions; (4) negligence; (5) intentional and negligent infliction of  
22 emotional distress; and (6) personal injury.

23 Liberally construed, plaintiff’s first, second and third causes of action state cognizable  
24 claims for relief under § 1983. Plaintiff’s fourth, fifth and sixth causes of action are not  
25 cognizable under § 1983, however, because they are state tort claims and do not allege the  
26 violation of a right secured by the Constitution or laws of the United States. See West, 487

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27 <sup>3</sup>Plaintiff was transferred to CCI on December 19, 2001.

1 U.S. at 48 (holding claim under § 1983 must allege violation of right secured by Constitution  
2 or laws of United States). Accordingly, plaintiff's fourth, fifth and sixth causes of action will  
3 be dismissed without prejudice to plaintiff's pursuing said causes of action in state court.

4 2. Defendants

5 In the AC, plaintiff names as defendants thirty-five of the thirty-six defendants he  
6 named in the original complaint; the one defendant named in the original complaint who is  
7 not named as a defendant in the AC is Custody Captain P. Moore. Accordingly, Moore will  
8 be dismissed as a defendant from this action.

9 Nineteen of the defendants who are named in both the AC and the original complaint  
10 have been served in this action and have made an appearance through counsel.<sup>4</sup> Accordingly,  
11 the Clerk need not issue additional summons and the United States Marshal ("Marshal") need  
12 not effectuate further service of the AC on said defendants; rather, plaintiff must serve  
13 counsel for these defendants with the AC.

14 An additional sixteen defendants who are named in both the AC and the original  
15 complaint were previously ordered served in this matter, but service was not effected because  
16 the defendants could not be located.<sup>5</sup> While a plaintiff who is incarcerated and proceeding in  
17 forma pauperis may rely on service by the Marshal, such plaintiff "may not remain silent and  
18 do nothing to effectuate such service;" rather, "[a]t a minimum, a plaintiff should request  
19 service upon the appropriate defendant and attempt to remedy any apparent defects of which  
20 [he] has knowledge." Rochon v. Dawson, 828 F.2d 1107, 1110 (5th Cir. 1987).

21 When plaintiff filed his original complaint, he did not provide sufficient information  
22 to allow the Marshal to locate and serve the sixteen referenced defendants, nor has he  
23 provided any further information in that regard since the time the summonses for these  
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25 <sup>4</sup>These defendants are: Kircher, Juarez, Moore, Galloway, Jansen, Lord, Basso,  
26 Monteiro, Negrette, Broomfield, Saucedo, Perez, Berry, Ellise, Rice, Holt, Rios, Calderon  
and Chen.

27 <sup>5</sup>These defendants are: Early, Peterson, Dickerson, Gillary, Gomez, Edwards,  
Sanchez, Munger, Mendoza, Engles, Ruiz, Miranda, Parson, Platting, Chavez and Thomas.

1 defendants were returned by the Marshal as unexecuted. Accordingly, at this time the Court  
2 will not reissue summons and order the Marshal to attempt to effectuate service of the AC on  
3 these defendants; rather, plaintiff must either himself effectuate service on said defendants, or  
4 provide the Court with sufficient information such that the Marshal is able to effectuate such  
5 service.

6 Two defendants named in the AC – SVSP Warden Lamarque and SVSP Correctional  
7 Officer G. Goodrum – were not named in the original complaint. Accordingly, the Court will  
8 order the Clerk to issue summons and the Marshal to serve these defendants.

9 B. Pending Dispositive Motions

10 Two dispositive motions are currently pending before the Court.

11 On March 15, 2007, the AG defendants filed a motion to dismiss the complaint for  
12 failure to exhaust administrative remedies, as a non-enumerated motion under Rule 12(b),  
13 and for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6).  
14 Plaintiff has filed an opposition to the motion, defendants have filed a reply, and plaintiff has  
15 filed a sur-reply.

16 On September 25, 2007, Chen filed a motion for summary judgment. On  
17 November 13, 2007, the Court granted plaintiff's motion for a continuance to file opposition  
18 to the motion; to date, plaintiff has not filed an opposition.

19 As discussed above, the AG defendants and Chen are named as defendants in the AC;  
20 consequently, because the AC supercedes the original complaint, the dispositive motions the  
21 AG defendants and Chen have filed in response to the original complaint will be denied as  
22 moot. Such dismissal will be without prejudice to defendants' renewing said motions, or any  
23 portions thereof, after defendants have been served with the AC.

24 C. Motion for Appointment of Counsel

25 Plaintiff has filed a motion for appointment of counsel. There is no constitutional  
26 right to counsel in a civil case such as this. See Lassiter v. Dep't of Social Services, 452 U.S.  
27 18, 25 (1981). Rather, pursuant to 28 U.S.C. § 1915, a district court has the power to

1 “request” that counsel represent a litigant who is proceeding in forma pauperis. 28 U.S.C.  
2 § 1915(e)(1). To date, plaintiff has been able to present his claims in an adequate manner  
3 and there are no exceptional circumstances warranting appointment of counsel at this time.  
4 Should the circumstances of the case materially change, the Court may reconsider plaintiff’s  
5 request sua sponte.

## 6 CONCLUSION

7 For the foregoing reasons, the Court orders as follows:

8 1. Plaintiff shall serve a copy of the AC on counsel for the following defendants:  
9 Kircher, Juarez, Moore, Galloway, Jansen, Lord, Basso, Monteiro, Negrette, Broomfield,  
10 Saucedo, Perez, Berry, Ellise, Rice, Holt, Rios, Calderon and Chen.

11 2. Within **ninety (90) days** of the date this order is filed, plaintiff must either himself  
12 effectuate service, or provide the Court with sufficient information such that the Marshal is  
13 able to effectuate service, of the AC on the following defendants: Early, Peterson, Dickerson,  
14 Gillary, Gomez, Edwards, Sanchez, Munger, Mendoza, Engles, Ruiz, Miranda, Parson,  
15 Platting, Chavez and Thomas.

16 3. The Clerk of the Court shall issue summons and the United States Marshal shall  
17 serve, without prepayment of fees, a copy of the AC (Docket No. 94) in this matter, all  
18 attachments thereto, and a copy of this order upon **Warden A.A. Lamarque and**  
19 **Correctional Officer G. Goodrum, at Salinas Valley State Prison.**

20 4. No later than **ninety (90) days** from the date of this order, defendants shall file a  
21 motion for summary judgment or other dispositive motion with respect to the claims in the  
22 AC found to be cognizable above.

23 a. If defendants elect to file a motion to dismiss on the grounds plaintiff failed  
24 to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
25 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune,  
26 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810  
27 (2003).

1 b. Any motion for summary judgment shall be supported by adequate factual  
2 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil  
3 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**  
4 **qualified immunity found, if material facts are in dispute. If any defendant is of the**  
5 **opinion that this case cannot be resolved by summary judgment, he shall so inform the**  
6 **Court prior to the date the summary judgment motion is due.**

7 5. Plaintiff's opposition to the dispositive motion shall be filed with the Court and  
8 served on defendants no later than **thirty (30)** days from the date defendants' motion is filed.

9 a. In the event the defendants file an unenumerated motion to dismiss under  
10 Rule 12(b), plaintiff is hereby cautioned as follows:<sup>6</sup>

11 The defendants have made a motion to dismiss pursuant to Rule 12(b) of  
12 the Federal Rules of Civil Procedure, on the ground you have not exhausted  
13 your administrative remedies. The motion will, if granted, result in the  
14 dismissal of your case. When a party you are suing makes a motion to dismiss  
15 for failure to exhaust, and that motion is properly supported by declarations (or  
16 other sworn testimony) and/or documents, you may not simply rely on what  
17 your complaint says. Instead, you must set out specific facts in declarations,  
depositions, answers to interrogatories, or documents, that contradict the facts  
shown in the defendant's declarations and documents and show that you have  
in fact exhausted your claims. If you do not submit your own evidence in  
opposition, the motion to dismiss, if appropriate, may be granted and the case  
dismissed.

18 b. In the event defendants file a motion for summary judgment, the Ninth  
19 Circuit has held that the following notice should be given to plaintiffs:

20 The defendants have made a motion for summary judgment by which  
they seek to have your case dismissed. A motion for summary judgment under  
21 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.  
22 Rule 56 tells you what you must do in order to oppose a motion for  
summary judgment. Generally, summary judgment must be granted when there  
23 is no genuine issue of material fact--that is, if there is no real dispute about any  
fact that would affect the result of your case, the party who asked for summary  
judgment is entitled to judgment as a matter of law, which will end your case.  
24 When a party you are suing makes a motion for summary judgment that is  
properly supported by declarations (or other sworn testimony), you cannot  
25 simply rely on what your complaint says. Instead, you must set out specific  
facts in declarations, depositions, answers to interrogatories, or authenticated

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27 <sup>6</sup>The following notice is adapted from the summary judgment notice to be given to pro  
se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).  
See Wyatt v. Terhune, 315 F.3d at 1120 n.14.



1 documents, as provided in Rule 56(e), that contradict the facts shown in the  
2 defendants' declarations and documents and show that there is a genuine issue  
3 of material fact for trial. If you do not submit your own evidence in opposition,  
summary judgment, if appropriate, may be entered against you. If summary  
judgment is granted in favor of defendants, your case will be dismissed and  
there will be no trial.

4 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to  
5 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S.  
6 317 (1986) (holding party opposing summary judgment must come forward with evidence  
7 showing triable issues of material fact on every essential element of his claim). Plaintiff is  
8 cautioned that failure to file an opposition to defendants' motion for summary judgment may  
9 be deemed to be a consent by plaintiff to the granting of the motion, and granting of  
10 judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.  
11 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

12 6. Defendants shall file a reply brief no later than **fifteen (15)** days after plaintiff's  
13 opposition is filed.

14 7. The motion shall be deemed submitted as of the date the reply brief is due. No  
15 hearing will be held on the motion unless the Court so orders at a later date.

16 8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.  
17 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is  
18 required before the parties may conduct discovery.

19 9. Defendants' motion to dismiss and motion for summary judgment are hereby  
20 DENIED as moot, without prejudice to defendants' renewing said motions, or any portions  
21 thereof, after defendants have been served with the AC. (Docket Nos. 69 & 81.)

22 10. Plaintiff's motion for appointment of counsel is hereby DENIED without  
23 prejudice. (Docket No. 93.)

24 11. All communications by plaintiff with the Court must be served on defendants, or  
25 defendants' counsel once counsel has been designated, by mailing a true copy of the  
26 document to defendants or defendants' counsel.  
27

12. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court informed of any change of address and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

13. Any motion for an extension of time must be filed no later than the deadline sought to be extended and must be accompanied by a showing of good cause.

This order terminates Docket Nos. 69, 81 and 93.

IT IS SO ORDERED.

DATED: February 11, 2008

*Maxine M. Chesney*  
MAXINE M. CHESNEY  
United States District Judge